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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 974

LEWIS HAYS,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (A NATIONAL BANKING ASSOCIATION), AS ADMINISTRATOR OF THE ESTATE OF WALTER G. ROBINSON, ALSO KNOWN AS W. G. ROBINSON, DECEASED

No. 975

F. PORTEOUS, INDIVIDUALLY, AND F. PORTEOUS AS AGENT,

Petitioner,

vs.

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PETITION FOR WRITS OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT.

CHARLES LEDERER,
CHARLES E. JOHNSON,
MARK M. BRAWMAN,
Counsel for Petitioners.

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PETITION FOR WRITS OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT.

Petitioners pray that writs of certiorari issue to review the judgment of the District Court of Appeal of the State of California, Third Appellate District (hereinafter

referred to as District Court of Appeal), entered on October 24, 1945, affirming judgments on demurrers to petitioners' complaints under the Fair Labor Standards Act of 1938.

Opinions Below

The trial court opinions are in the record (R. 3) but not reported. The opinion of the District Court of Appeal (R. 13), is reported in 71 Advance California Appellate Reports (A. C. A.) 410; 162 P. 2d 679. The Supreme Court of the State of California denied petitioners' application for a hearing without opinion (R. 40).

Jurisdiction

The judgment of the District Court of Appeal was entered October 24, 1945 (R. 23). On December 1, 1945 petitioners filed their petition for a hearing in the Supreme Court of the State of California (R. 26). Said petition was denied by said Court on December 20, 1945 (R. 40).

The Rules on Appeal of the California Supreme Court provide that said Court may order a civil cause transferred to itself for hearing and decision within 60 days after the filing of a decision of the District Court of Appeal. A party seeking such hearing must serve and file a petition therefor within 40 days in civil causes after the filing of the decision of the District Court of Appeal. Rule 28(a)(b) Rules on Appeal; 22 C. 2d 20. Petitioners duly complied with said rules.

An application for a writ of certiorari is timely if filed within three months of the date of declining jurisdiction by the State Court of last resort.

Department of Banking v. *Pink*, 317 U. S. 264, 87 L. Ed. 254.

The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code, 28 U. S. C. A. Section 344(b), 8 F. C. A., title 28, Section 344(b).

Questions Presented

1. Whether the State Statutes of Limitations are applicable in actions under the Fair Labor Standards Act to recover unpaid overtime compensation, liquidated damages and attorneys' fees.

2. If State Statutes of Limitations are applicable, what particular statutory limitation is applicable, contract, tort, or statutory liability, to the various items included in the right of recovery?

3. If State Statutes of Limitations are applicable, are they applicable alike to all items of recovery under the Fair Labor Standards Act, or only to some of them?

Statutes Involved

Section 16(b) of the Fair Labor Standards Act of (June 25) 1938, 52 Stat. 1060, 1069, C. 676; 29 U. S. C. A. Section 216(b), 9 F. C. A. title 29, Section 216(b) is printed in the Appendix (p. 11, *infra*).

The material portion of Section 707 of the California Probate Code reads as follows:

> All claims arising upon contract, whether they are due, not due, or contingent, * * * must be filed or presented within the time limited in the notice * * *; and any claim not so filed or presented is barred forever, * * *

The material portion of Section 716 of the California Probate Code reads as follows:

> No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the Clerk or presented to the executor or administrator, * * *

Statement

Petitioners filed complainants alleging they had worked for Respondent's decedent, Walter G. Robinson, in bringing logs from the forest to a mill in California where the logs were cut into lumber; that said lumber was sold thereafter outside the State of California; that petitioners had worked overtime; that said decedent failed, neglected and refused to pay overtime compensation to petitioners, and pray for damages equal to the unpaid overtime compensation, liquidated damages and attorneys fees provided for by the Fair Labor Standards Act (R. 1) (R. 6).

Demurrers were filed to said Complaints (R. 3) (R. 11), Respondent contending that the complaints failed to state causes of action because petitioners had failed to comply with Sections 707 and 716 of the California Probate Code (*supra*). The actions were consolidated for trial.

The trial court sustained the demurrers without leave to amend (R. 5) (R. 12), holding petitioners' claims arose upon contract and therefore Section 707 of the Probate Code applies (R. 3). Judgments denying petitioners any relief were duly entered (R. 6) (R. 12).

On appeal, the cases were again consolidated and the District Court of Appeal affirmed the judgments, holding that claims against an employer's estate for unpaid overtime compensation, liquidated damages and attorneys' fees under the Fair Labor Standards Act are based on contracts of employment, or "*quasi ex contractu*" within the California Statutes of Limitations requiring claims arising upon contract to be filed against the estate of a decedent before suing thereon (R. 13).

Reasons for Granting the Writ

1. In holding that the items recoverable under the Fair Labor Standards Act are claims arising upon contract and therefore subject to the state statute of limitations applicable to *contract* claims against the estate of a decedent, the State Appellate Court of last resort decided federal questions of substance not heretofore determined by this court. The State Court has denied petitioners' title, right and privilege, specially set up and claimed by them under the Fair Labor Standards Act. The Action of the State Court is predicated directly upon its interpretation of the federal statute. We know of no decision by this court in which the questions herein presented and heretofore determined by the State Court have been passed upon by this court.

2. The District Court of Appeal in holding as aforesaid decided a federal question of importance in a way which probably conflicts with decisions of this Court.

This Court said in *Brooklyn Savings Bank* v. *O'Neil*, — U. S. —, 89 L. Ed. 876, 883:

"The private-public character of this right is further borne out by an examination of the enforcement provisions of the Act. Although the difficulties of enforcement under the Act were recognized, the Administrator was given limited enforcement powers. Criminal prosecution was available only for wilful violations—difficult to prove. Section 16(a). The Administrator's civil remedy lay by way of suit for an injunction, which by its nature tends to be prospective in operation. No power was vested in the Administrator to bring direct suit to obtain payment of minimum wages left unpaid and to recover damages arising from delay in payment. Sole right to bring such suit was vested in the employee under § 16 (b). Although this right to

sue is compensatory, it is nevertheless an enforcement provision * * *."

3. The holding of the District Court of Appeal conflicts with the holding in *Culver* v. *Bell & Loffland,* 9 Circuit, 146 F. 2d 29. The Federal Court held that the statute of limitations governing actions under the Act is section 338 California Code of Civil Procedure,[1] and said at page 31:

"The view of the Supreme Court in respect of the nature of this statutory claim is indicated in the following passage from its opinion in Overnight Motor Transp. Co. v. Missel, 316 U. S. 572, 583, 62 S. Ct. 1216, 1222, 86 L. Ed. 1682: 'Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee. *The wages were specified for him by the statute,* and he was no more at fault than the employer. The liquidated damages for failure to pay the minimum wages under Sections 6 (a) and 7 (a), 29 U. S. C. A. § 206 (a), 207 (a) are compensation, not a penalty or punishment by the Government. Cf. Huntington v. Attrill, 146 U. S. 657, 667, 668, 674, 681, 13 S. Ct. 224, 227, 228, 230, 233, 36 L. Ed. 1123; Cox v. Lykes Brothers, 237 N. Y. 376, 143 N. E. 226. *The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages* (citing cases). (Italics added.)'"

We believe this Court intended the word "compensation" to mean "compensatory damages" for the wrong of retaining the workman's pay, thereby invading the employee's

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[1] California Code Civil Procedure; Sec. 338 (1): "Within 3 years: an action upon a liability created by statute, other than a penalty or forfeiture."

Compare: California Code Civil Procedure Sec. 339 (1): "Within 2 years: An action upon a contract, obligation or liability not founded upon an instrument of writing * * *" and,

California Code Civil Procedure Sec. 337 (1): "Within 4 years: An action upon any contract, obligation or liability founded upon an instrument in writing * * *."

right to a minimum standard of living necessary for health, efficiency and well being, recognized by Congress and protected by the new cause of action conferred upon employees by the Act.

In *Abram* v. *San Joaquin Cotton Oil Co.* (D. C. Cal.) 46 Fed. Supp. 969, 976, the court discussed at length the question here involved and concluded as follows:

" 'The phrase "liability created by statute" means a liability which would not exist but for the statute * * *.' 37 C. J. 783, § 123. 'Where a duty exists only by virtue of a statute, or an obligation to pay is fixed in the Act itself, the obligation is one created by statute.' 16 Cal. Jur. 473. It is true many fine distinctions may be drawn in an attempt to determine the variations of a contractual liability where a statute is involved and a purely statutory liability; yet the conclusion that the obligation of the employer to pay time and one-half for overtime is statutory under the Act, is hardly escapable in view of the purpose and provisions of the Act. Therefore Section 338, Subdivision 1 would apply in an action to recover additional wages under the Act and not Section 339, subdivision 1 (cases cited). (See note 1 supra.)"

In *Lorenzetti* v. *American Trust Co.* (D. C. Cal.), 45 Fed. Supp. 128, at page 139, the court said:

"While the existence of the employer-employee relationship brought plaintiffs and their employers within the Act, and the rate at which they were paid determined the amount of overtime to which they are entitled, there would be no liability, were it not for the Act. A liability created by statute has been defined as one which would not exist but for the statute (cases cited)."

In *Cannon* v. *Miller,* — Wash. —, 155 P. 2d 500, 509, 157 A. L. R. 530, 543, the court, in refusing to follow a

contrary district court holding in *Cunningham* v. *Weyerhaeuser Timber Co.* (D. C. Wash.), 52 Fed. Supp. 654, 657, said:

"With all due respect to the court pronouncing that conclusion, we are unable to agree with that pronouncement in its entirety. We can agree that the action is clearly one for compensation under all the decisions touching that question, but we cannot agree that it rests fundamentally upon an oral contract of employment, rather than upon a 'statutory liability.' It may be conceded, also, that the liability is 'contractual in nature,' in the sense that the law will imply an obligation on the part of the employer to pay his employee the wages specified in the statute. But this does not mean that it is a liability arising out of contract. On the contrary, the obligation of the employer to pay minimum wages is fixed by the statute; the prohibition against excess hours of employment except upon the basis of one and one-half times the regular rate of pay is enjoined by the statute; and the remedy for the breach of either duty is prescribed by the statute. The breach therefore gives rise to 'a liability created by statute.' "

The Supreme Court of Oregon has recently indicated its adherence to the *Culver* and *Cannon* cases (*supra*), *Fullerton* v. *Lamm*, — Ore. —, 163 P. 2d 941, 944.

In *Pace* v. *National Bank of Commerce of Tulsa*, — Okla. —, 125 P. 2d 178, the court held the liability under the Act not to be contractual within the state lien law.

In *Northwestern Yeast Co.* v. *Broutin* (6 Circ.), 133 F. 2d 628, 630, the court held the liability under the Act is based on contract.

In *Loggins* v. *Steel Const. Co.* (5 Circ.), 129 F. 2d 118, the court held the action under the Act was one to recover wages. The court said, however, at page 120:

"But if we could agree with appellant that the suit is not for wages we could not at all agree that it is a suit in quasi contract and within the 10 year prescription of Article 3544. We would be bound to hold that if not a suit for wages it was in tort for damages for a crime or a quasi crime, that is, for the violation of the positive provisions of Section 7 and therefore within the one year prescription of Article 3536."

In a separate concurring opinion (P. 121, *supra*) Judge Sibley said:

"Section 6 is affirmative in form, requiring that 'every employer shall pay to each of his employees • • • wages at the following rates', so that the statute amends every contract for labor which falls under it so as to provide for those rates; and what is due is wages. Section 7 is negative and prohibitory in form, 'No employer shall • • • employ any of his employees' for longer hours than specified 'unless such employee receives compensation' for the excess time at one and a half times the regular rate. It annuls as illegal contracts to the contrary by forbidding their execution unless a 'compensation' is made at a high rate. The high rate is not called wages, but compensation. The same distinction appears in Section 16(b), giving the Federal rights of action, where what is due under Section 6 is again referred to as 'minimum wages' and what ought to have been paid to escape penalization under Section 7 is again called 'overtime compensation'. The doubling of each is called 'liquidated damages'. I am of opinion that an action for unpaid minimum wages is one for wages, and that the damages by doubling them are inci-

dental, as interest would be; so the Louisiana Civil Code Art. 3534, which deals alone with 'action * * * of workmen * * * for the payment of wages', would be applicable. But where, as here, the action is for 'overtime compensation' and damages, due because a prohibitory statute has been violated, it is not one for wages, but for a quasi offense, or tort."

It is now firmly established in this State that Section 707 of the California Probate Code does not include a liability created by statute or a tort claim.

People v. *Hochwender*, 20 C. 2d 181, 184.

Therefore, if this Court is of the opinion that the within actions are not founded upon contract claims, we respectfully submit that the State courts should be reversed and enlightened.

To cite further cases would simply magnify the conflict in the decisions between State and Federal courts and among Federal courts themselves without indicating any clear course of decision. The questions presented by the within Petition are matters of first impression we believe in this court. The annotation in 157 A. L. R. 545 collects the cases on the points here presented, and reveals the incongruous nature of the many decisions already made.

Conclusion

It is respectfully submitted that for the reasons stated this petition for writs of certiorari should be granted and for which we pray.

March, 1946.

CHARLES LEDERER,
Of Counsel;
CHARLES E. JOHNSON,
MARK M. BRAWMAN.

APPENDIX

Section 16b of the Fair Labor Standards Act of (June 25) 1938, 52 Stat. 1060, 1069 C 576; 29 USCA Section 216(b); 9 FCA Title 29 Section 216(b) reads as follows:

Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employes similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

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(CONSOLIDATED CASES)

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR WRITS OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT.

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INTRODUCTION.

These actions were brought by the respondents under the provisions of the Fair Labor Standards Act of 1938 (29 U.S.C.A., Sections 201 et seq.), to recover unpaid overtime compensation and an additional equal amount of liquidated damages, costs, and a reasonable attorney's fee provided for by the Act.

It is conceded that plaintiffs' claims and their purported rights of action thereon arose during the lifetime of Walter G. Robinson out of their employment by him.

The complaints failed to show the presentation of claims to the administrator of the estate of Walter G. Robinson, deceased. Further, it is conceded that the actions were brought against the administrator of his estate without filing a claim and after expiration of the time within which to file claims.

The respondent filed demurrers to appellants' complaint on the ground that the complaints do not state causes of action, by reason of their failure to allege the filing and presentation of the claims with the administrator.

It having been conceded that the time for filing claims had elapsed, the trial Court sustained the demurrers without leave to amend.

QUESTION INVOLVED.

The sole question involved is: Do the matters stated in the complaint show that the appellants' claims arise upon contract within the meaning of Section 707 of the Probate Code of the State of California so as to require the filing of a claim with the administrator prior to suit?

The judgment of the trial Court is an affirmative answer to this question, and said judgment has been sustained by the District Court of Appeal, 3rd Appellate District for the State of California, and again sustained by the Supreme Court of the State of California by its action in denying the appellant a hearing.

The question is unique and whatever may have been the pronouncement of the various Courts as to the nature of the obligation, and the right of the employees to relief, the instant case must be considered in the narrowed light and effect of the death of the employer, and the statutes governing administration of decedent's estate. Further, a distinction must be made between a statutory obligation affecting a relationship between a government and an individual (such as a tax case, *People v. Hochwender,* 20 C. (2d) 181, 184, cited by petitioners), and an obligation affecting rights between two or more individuals (such as recovery of wages and damages under the Wage and Hour Act).

The petitioners contend that a federal question is presented because the decisions involve an interpretation of the Fair Labor Standards Act.

The accuracy of petitioners' contention or statement is so limited that it requires but little consideration. In order to avoid the effect of the provisions of Section 707 of the Probate Code, State of California, requiring all claims "arising upon contract" to be filed with the administrator within six months from the date of first publication of notice to creditors, the petitioners have failed to recognize the actual basis for their claim, and have attempted to classify it as being either purely statutory or tortious.

Though attempting to make this distinction, they have been unable to define or classify the claim as being anything but contractual.

The Fair Labor Standards Act imposes upon the employer the obligation to pay overtime compensation at one and one-half times the regular rate of pay for hours worked in excess of 40 hours, and further, subjects the employer to the payment of liquidated damages and attorney's fees in the event of the employer's failure to pay the overtime compensation.

THE LANGUAGE OF THE FAIR LABOR STANDARDS ACT IMPORTS LIABILITY ARISING OUT OF CONTRACT.

The pertinent part of Section 16 of the Fair Labor Standards Act provides:

> "* * * any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the amount of their *unpaid minimum wages* or their *unpaid overtime compensation* as the case may

be, and in an additional equal amount as liquidated damages." (Italics supplied.)

The term "overtime compensation" is of such common use that it can admit of but one meaning, to-wit: overtime wages.

The payment of overtime at an increased rate was well established and in common use long prior to the enactment of the Fair Labor Standards Act. The enactment was made in the light of the well established popular meaning of its terms and must be so construed. (*Barron v. Board of Dental Examiners,* 109 Cal. App. 382, p. 385; 50 *Am. Jur.* 227, et seq.) These words can only refer to the overtime pay arising out of the contract of employment.

The term "liquidated damages" signifies the damages the amount of which the *parties to a contract* stipulate and agree, when the *contract* is entered into, shall be paid in case of a breach. (Italics supplied.)

15 *Am. Jur.* 671.

The statute simply imposes upon the contract of employment certain terms as to hours, overtime pay, and liquidated damages assessable against the employer in the event of his failure to perform the contract of employment, to-wit: Failure to pay the employee at the rates and at the time for the hours worked according to the terms of the contract as regulated by the statute.

It must be recognized that the Act does not come into operation either with respect to overtime com-

pensation or liquidated damages, except through and by virtue of the contract of employment. If the contract of employment did not exist, the Act would not be operative.

It at once becomes apparent that the claim arises upon the contract of employment.

A LIABILITY MAY BE BOTH STATUTORY AND CONTRACTUAL.

This rule is well established.

Platt v. Wilmot, 193 U.S. 613;

Bliss v. Sneath, 119 Cal. 526, p. 530;

Abram v. San Joaquin Cotton Oil Co., 46 Fed. Supp. 969, p. 976.

It is well settled law that all applicable laws in existence when an agreement is made necessarily enter into it and form part of it as fully as if they were expressly referred to and incorporated in it in terms.

13 *Corpus Juris,* p. 560;

Marshall v. Wentz, 28 Cal. App. 540, pp. 542, 543.

Parties are presumed to have contracted with reference to laws in existence at the time the contract was made; and when a law affects the validity, construction, discharge, or enforcement of the contract it enters into and forms a part of it, measuring the obligations of one party and rights acquired by the other.

Connecticut Mut. Life Ins. Co., v. Cushman, 108 U.S. 51 (27 L. Ed. 648, 2 Sup. Ct. Rep. 236);

Northern Pacific R. R. Co. v. Wall, 241 U.S. 87 (60 L. Ed. 905, 36 Sup. Ct. Rep. 493, see also Rose's U. S. Notes);

Ede v. Knight, 93 Cal. 159 (28 Pac. 860);

Burke v. Meyerstein, 94 Cal. App. 349, p. 353.

Therefore, it is plain that the statutes regarding the measure of damages are implied terms in many contracts. No reason appears why expressly inserting a clause regarding damages would have different operation than the implied insertion of a clause on that subject, and it was so held in *Gally v. Wynee,* 96 Cal. App. 145, p. 148.

It necessarily follows that the provisions of the Fair Labor Standards Act were a part of the contract of employment existing between Mr. Robinson and his employees and that any claim they might have for unpaid overtime or for liquidated damages arises directly out of the contract of employment.

> "The law providing the remedy for the enforcement of a contract is as much a part of the contract as any other legal requirement affecting the contract."
>
> *Wood v. Lehne,* 30 Cal. App. (2d) 222, p. 226.

A contractual relationship is the only logical basis for the claim and it might well be compared with the stockholders' liability formerly existing in this state with respect to which it has been held, that although the liability exists by statute, the statute is a part of the contract between the stockholder and the corporation, and being contractual in nature a creditor of

the corporation expecting to enforce the stockholders' liability against the estate of a deceased stockholder must file a claim with the administrator prior to commencement of the action.

Miller & Lux v. Katz, 10 Cal. App. 576, p. 578;
Geary Street Railroad v. Bradberry, 179 Cal. 46, p. 49;
Kennedy v. Calif. Savings Bank, 97 Cal. 93.

This is also held to be the case in the matter of other statutory obligations such as Workmen's Compensation.

21 *Am. Jur.* 587, 94 A.L.R. 885.
Stitz v. Ryan, 256 N.W. 173.

The claim for these damages has been directly adjudicated to be contractual in nature.

Northwestern Yeast Company v. Broutin, Circuit Court of Appeals, Sixth Circuit (1943), 133 Fed. (2d) 628.

In this case, the Court held:

"Under the federal decisions, the statutory obligation contained in the Fair Labor Standards Act is read into and becomes a part of every employment contract * * * the liability is for wages due employees under working agreements which the federal statute requires employer and employee to make."

This definition of liability under the Act was made by the Court in considering whether the amount accruing to the employee was a debt arising on contract within the meaning of the attachment laws. It was held that an attachment was properly issued.

The same rule was announced in *Loggins v. Steel Construction Company,* 129 Fed. (2d) 118, where it was held that the recovery under the Act by the employee was wage income for income tax purposes.

In *Monseau v. United States,* 52 Fed. Supp. 395, it was held "The act was part of the contract of employment". In the case of *Cunningham v. Weyerhauser,* 52 Fed. Supp. 654, it was held "The act is incorporated into the contract of employment".

In determining whether appellants' claims, "arise upon contract", it seems to us that the answer to the following question is conclusive.

Would there be any liability on the part of the deceased employer in the absence of the contract of employment?

The answer to this question being in the negative, it necessarily follows that the claim, or purported causes of action, "arise upon the contract" of employment, else there could be no claim.

Similar federal statutes have been held to impose both statutory and contractual liabilities.

In re Beasley's Estate, 11 N.E. (2d) 60 (Ind.).

This was an action brought against an administrator for the decedent stockholder's liability under the National Banking Act. The Court there held as follows:

> 1. The individual liability of the stockholder is contractual. Though compulsory, the National Banking Act becomes a part of every contract of the bank. (Citing U.S. Supreme Court decisions.)

2. In the collection of stockholder's liability in national banks the suit or claims for such liability must be brought or filed before the statute of limitations in the state wherein the stockholder resides or his estate is pending bars the suit or claim.

3. The claim statutes of Indiana required the claim to be filed prior to suit.

Platt v. Wilmot, 193 U.S. 602:

"This liability was created by statute, as it was by virtue of the statute that the *contractual* liability arose * * * the contract being that the holder of the stock shall be liable in accordance with the terms of the statute * * * the liability arising therefrom is because of the principle of law which works out a contractual liability upon these facts." (Italics supplied.)

This is the settled law of this state. *Royal Trust Co. v. MacBean,* 168 Cal. 642, p. 647 et seq. (Statute of Limitations; *Kennedy v. Calif. Savings Bank,* 97 Cal. 93 (holding the stockholders' statutory liability to be contractual within the meaning of the attachment laws).)

The case of *Lorenzetti v. American Trust Co.,* 45 F. Supp. 128, applies the three-year statute of limitations and likewise quotes with approval from *Platt v. Wilmot,* 193 U.S. 602, to the same effect as *Abram v. San Joaquin Cotton Oil Co.,* supra.

The employer's liability under the Act arises upon the contract of employment, which contract is digni-

fied and controlled by, and has incorporated in it, the terms of the statute by which the minimum amount of wages is prescribed.

The petitioners have presented three questions, the first of which is:

> "Whether the State Statutes of Limitations are applicable in actions under the Fair Labor Standards Act to recover unpaid overtime compensation, liquidated damages and attorneys' fees."

This question has been decided for many years; the rule is that where a federal statute is silent as to limitations the Statute of Limitations in the state where the action is brought is controlling.

34 *Am. Jur.*, 51;
Chattanooga Foundry and Pipe Works v. Atlanta, 203 U.S. 390;
Payne v. Ostrus, 50 F. (2d) 1039;
77 *A.L.R.* 531.

The second of these questions is:

> "If State Statutes of Limitations are applicable, what particular statutory limitation is applicable, contract, tort, or statutory liability, to the various items included in the right of recovery?"

This question must be answered not only in the light of the ordinary statutes on limitation of actions but also in the light of the further limitation of actions imposed by the provisions of the Probate Code governing the administration of decedent's estates.

In the State of California a claimant has six months after the first publication of Notice to Creditors

within which to file a claim. (Probate Code Section 700.) Action is forever barred upon a claim which is not filed within the statutory time.

Probate Code, Section 707:

"All claims arising upon contract, whether they are due, not due, or contingent, * * * must be filed or presented within the time limited in the notice * * * and any claim not so filed or presented is barred forever * * *."

Probate Code, Section 716:

"No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the Clerk or presented to the Executor or Administrator * * *."

As shown above, the actions brought by the petitioners arise upon the contract of employment, and for that reason are subject to the provisions of the Probate Code. No claims having been filed, any purported action by the petitioners is barred.

The third question is:

"If State Statutes of Limitations are applicable, are they applicable alike to all items of recovery under the Fair Labor Standards Act, or only to some of them?"

With respect to the instant case, this question must be answered to the effect that the same statute of limitations is applicable to all of the items attempted to be recovered by plaintiffs' complaint. No distinction can be made between the overtime compensation (wages) and the liquidated damages, for the reason

that neither could be claimed at any time by the petitioners in the absence of the contract of employment. It must necessarily follow that both types of claims arise upon the contract of employment, as defined by Section 707 of the Probate Code of the State of California.

It has been directly adjudicated in this state that wages are a contractual obligation and that a claim for unpaid wages must be presented to the administrator. (*Washburn v. Keltz,* 115 Cal. App. 252.) A similar holding was made in *Lowry v. Crandall,* 83 Pac. 1003 (Ariz.). It would seem that petitioners' quotation from this Honorable Court's decision in the case of *Overnight Motor Transportation Company v. Missel,* 316 U.S. 572, 86 L. Ed. 1682, would be decisive. It is therein stated:

> "perplexing as petitioners' problem may have been, the difficulty does not warrant shifting the burden to the employee. The *wages were specified* for him by the Statute and he was no more at fault than the employer. The *liquidated damages* for failure to pay the minimum wages under Sections 6A and 7A *are compensation,* not a penalty or punishment by the Government." (Italics supplied.)

It is also a policy of law that he who sleeps on his rights is lost. Also we have a further policy of law which requires a rapid and orderly settlement of the affairs of an estate. The legislature in California has prescribed that six months is a reaonable time within which a creditor may present his claims, and if he does

not present them within that time he is forever barred. The appellants failed to claim the amounts which they now claim until long after the time for presenting claims had elapsed. Now they are asking this Court to relieve them from the result of their own failure, by ignoring all of the established concepts of law and by placing a mythical nature on the claims upon which the actions are based, so as to avoid the provisions of the Probate Code.

The contract of employment must exist before the statute comes into operation.

Where there could not by any possible stretch of the imagination be any liability to the employee in the absence of the contract of employment, and where the liability imposed by the statute only comes into existence where there *is a contract of employment,* it would seem conclusive that the purported causes of action arise upon contract and that therefore, the filing of a claim against the estate prior to suit is prerequisite.

CONCLUSION.

It is respectfully submitted that:

1. The judgments of the State Courts in the instant cases are regular in every respect and are in harmony with the established decisions.

2. That no reason is shown in the petition for invoking the jurisdiction of this Honorable Court.

Wherefore, respondent prays that the petition for the writs be denied.

Dated, April 10, 1946.

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